EXHIBIT B
PART 2

that prevent cities from engaging in bidding wars to lure auto dealers and other large sales techs generating businesses to relocate them from one city to another. The owner of Rally, one Mr. Mayle, provided an affidavit on behalf of Palmdale in that action. New GM argues that Rally, through its agent, Mr. Mayle, is providing assistance in litigation against New GM and is interfering with the establishment of a new dealership in violation of the wind-down agreement.

Rally argues that the arbitrator was bound by the Dealer Arbitration Act to either reject or accept the entire dealer contract and that the arbitrator exceeded his authority by not reinstating the Chevy brand as well. Thus, on August 13, 2010, Rally filed suit in California district court seeking to vacate or modify the arbitration award and to prevent termination of his Chevy dealer agreement though presumably wishing to maintain intact the other aspects of the arbitrator's award which maintained his dealerships for the other three brands, Cadillac, Buick and GMC.

Rally alleges, in substance, that the arbitrator's award in not giving him a complete victory was erroneous as a matter of law in its failure to accept its position that all of the separate brands had to be considered together in the species of double or nothing. He has not alleged that the arbitration award was the result of bribery, fraud, corruption, manifest disregard of settled law or any other ground that

would be a basis for vacating an arbitration award if the Federal Arbitration Act applied.

I'll now turn to my conclusions of law. Turning first to jurisdiction and within the jurisdiction umbrella, first, to subject matter jurisdiction. First, it's plain that the district courts and bankruptcy courts in this district have subject matter jurisdiction over this controversy. The applicable subject matter jurisdiction statute is 28 U.S.C., Section 1334, the section of the judicial code that follows the judicial code sections relating to federal question, diversity and admiralty jurisdiction. 1334 deals with subject matter jurisdiction with respect to bankruptcy cases and proceedings. That section provides, in relevant part, subsection (b), with exceptions not relevant here, "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11".

Rally addresses the issue of "related-to" jurisdiction under 1334 but that isn't the relevant subject matter jurisdiction issue. Rather it's the "arising in" prong of 1334 where New GM relies on an order I entered last year in this case under which this Court retained exclusive jurisdiction in paragraph 71(f) to "resolve any disputes with respect to or concerning the deferred termination agreements". The deferred termination agreements, which as I noted are also

referred to as the wind-down agreements, included provisions by which dealers and New GM contractually agreed that this Court retained full and exclusive jurisdiction to enforce them as well as to specifically preclude Rally and other wind-down dealers from filing suit against New GM and taking any action to interfere with New GM's establishment of additional dealerships. I'll note parenthetically that there was nothing in the Dealer Arbitration Act to modify the subject matter jurisdiction of the federal courts nor to modify any of my earlier orders other than to provide what amounted to a defense to enforcement of the deferred termination agreements if and to the extent that a dealer prevailed in the arbitration process for which Congress provided.

Rally did prevail in the arbitration process with respect to three of its franchises and, presumably, would like to avail itself and enforce that part of the arbitration award. But it wishes to upset the arbitration result as to which it didn't prevail and used the hoped-for alternative result, that is, a reinstatement of its Chevy franchise, as a defense to its duties under the deferred termination agreement which duties otherwise obligated it to give up its Chevy dealership, that being a classic "dispute with respect to or concerning the deferred termination agreements".

Now, Rally may have come to an agreement by the end of oral argument. But in any event, I so rule that this Court

does have subject matter jurisdiction over this controversy.

Similarly, I find that this is a core matter. Under 28 U.S.C., Section 157(a)(2)(N), core matters include, with exceptions not relevant here, orders approving the sale of property. The 363 sale order and my approval of the wind-down agreement documented the outcome of those core proceedings. And a proceeding such as the motion now before me which seeks relief predicated on a "retained jurisdiction" clause in my order resolving a core matter is a core matter as well. The decision in Eveleth Mines, 312 B.R. at pages 644 to 645, is directly on point. In that case, the Court noted the motion that barred directly and necessarily comes out of a core proceeding in this case, the debtors' motion for authority to conduct a sale of assets of the estate free and clear of liens. Court proceedings under 28 U.S.C., Section 157(b) fall under the "arising under" or "arising in" jurisdiction of 28 U.S.C. Section 1334(b). Then the enforcement of orders resulting from core proceedings are themselves considered core proceedings.

The Second Circuit has held similarly. It's held that bankruptcy courts are empowered to enforce the sale orders that they enter and to protect the rights which were established by the sale order. See Millenium Seacarriers, 419 F.3d at 97; and Petrie Retail, 304 F.3d at 229-230. Petrie Retail is particularly instructive because it also dealt with a dispute between two nondebtors addressing rights that were

created by the sale order. Though Petrie Retail was not unanimous, it's no less binding on the lower courts for that reason.

Now there can be no dispute what the sale order actually said. Nor can there be any dispute as to the wind-down agreement said. Section 13 of the wind-down agreement had that continuing jurisdiction clause providing that the dealer hereby consented to and agreed that the bankruptcy court would retain full complete and exclusive jurisdiction to interpret, enforce and adjudicate disputes concerning the terms of this agreement and any other matter related thereto.

Here and to the extent Rally was successful in the arbitration, of course that would be a defense to win any effort to make it terminate its agreement. And to the extent that it wishes to either enforce the agreement as it has the right to do with the three franchises for which it prevailed or to defeat the agreement with respect to the one agreement where it lost, in any event they concern the terms of the agreement and, in particular, any other matter related thereto. I don't think that's subject to serious dispute.

Finally, I've considered and ultimately rejected Rally's suggestion that I exercise discretionary abstention on that. Plainly, there is a right to invoke discretionary invention under 1334(c)(1) of the judicial code. That's 28 U.S.C. Section 1334(c)(1) which provides that nothing in this

section prevents a district court in the interest of justice or in the interest of comity with state courts or respect for state law from abstaining or hearing a particular proceeding arising under Title 11 or arising in or related to a case until Title 11. And while it speaks principally of state courts and state law, I accept for the purposes of this analysis that we, bankruptcy courts have the power to abstain in favor of other federal courts when the circumstances so warrant. But I don't believe that the factors here so warrant. Standards that have been articulated for the exercise of discretionary abstention include of the efficient administration of the bankruptcy estate, comity, the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, the existence of the right a trial and prejudice to the involuntarily removed party. Some of these, obviously, come in removal cases.

Here, I think the factor that is most important is the effect of the effect deficient administration of the bankruptcy estate. This was a procedure that needed to be resolved quickly as evidenced by the very tight time frames that Congress imposed. As important or more so, the bidders of the world that come in to bid for assets in the bankruptcy court must have knowledge that bankruptcy courts will stand by the documents as they were then drafted to give the parties to those agreements the predictability in their relations for which they are binding and upon which they justifiably rely.

The Court in Eveleth Mines explained "as applied to a sale free and clear of liens, there are also good policy reasons for making a derivative core proceeding classification. Active bidding on assets from bankruptcy estates will be promoted if prospective purchasers have the assurance that they may go back to the originally forum that authorized the sale for a construction or clarification of the terms of the sale that it approved. Relegating post-sale disputes to a different forum injects an uncertainty into the sale process which would dampen interest and hinder the maximization of value. A purchaser that relies on the terms of a bankruptcy court's order and whose title and rights are given life by that order should have a forum in the issuing court." That is very strong guidance that suggests that a Court, like me, should not abstain in favor of another jurisdiction.

Similarly, comity is a factor that I would take into account if there were, as contrasted to here, strong state law concerns. But here, of course, there are not. I, no less than a district court, either in New York or California, can determine that which is just in determining whether or not to enforce or, as more relevant here, to undercut an arbitration award.

The degree of relatedness or remotedness of the proceeding to the main bankruptcy court is subject to a double entendre. On the one hand, this is not going to affect the

assets and order of its liquidation in court. But the factors articulated in Eveleth Mines likewise cause Courts here to be slow to abstain because giving purchasers of assets the comfort that their needs and concerns are going to be addressed is pretty important.

I consider the existence of the right to a jury trial inapplicable because I assume that this would be decided without a jury trial in either events and I also consider prejudice to the involuntary removed party under the facts of this case.

So for all of these reasons, I decline to exercise discretionary abstention.

Now turning to what I should do with this controversy before me. Both sides now seem to agree that the Federal Arbitration Act doesn't apply because it implements contractual agreements to arbitrate. And here, the right to compel arbitration comes not from a contract but from the Dealer Arbitration Act itself. And it also now appears to be undisputed that the Dealer Arbitration Act doesn't provide for judicial review of arbitration awards issued after the mechanisms for which the Dealer Arbitration Act provides.

Nor do I think that I can or should find an applied right to judicial review under that statute. First, as you know from reading many earlier decisions that I've issued, I start with textural analysis where I note the significant

absence of such a provision when federal statutes routinely provide for rights to federal -- to judicial review when that is the congressional intent. If I were to imply such a provision here that would be a species of judicial legislation. Second, assuming without deciding that I could appropriately look at legislative history on a matter where the statute is not in any way ambiguous, judicially in grafting rights under that statute would be particularly inappropriate when they'd be inconsistent with the congressional desire to establish this mechanism to avoid the excessive costs and delays of litigation and to impose tight deadlines to get the arbitration process completed.

Nor can I accept Rally's argument that New GM conceded a right to judicial review by reason of its willingness to proceed under the AAA's commercial arbitration rules. In responding to Rally's arbitration demand, New GM expressly stated that it did not waive any objections it might have to the arbitration or to any of the AAA's commercial arbitration rules including, in particular, where such rules would be inconsistent with the provisions or purposes of the Dealer Arbitration Act. For that same reason, I can't find a waiver on the part of New GM of its rights based on a failure to protest again after its initial reservation of rights was put on the record.

Then even if New GM had agreed to AAA arbitration

rules, the arbitration rules called for a mechanism to enforce an award not to attack it. Those rules provided that parties to an arbitration under these rules shall be deemed to have consented the judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof. See Rule 48(c) of the AAA Commercial Rules quoted at paragraph 29 of the Rally brief.

But that language conveys a right to enforce the arbitration award not to attack it. For example, if New GM had failed notwithstanding the arbitration award that Rally doesn't complain about to let Rally keep the three franchises the arbitrator said Rally could keep, Rally could have, at least arguably if not plainly in my view, come back to me and say make New GM do what the arbitrator said it should do. But this is the exact opposite of what we have here and one that's not authorized by the federal statute.

As I indicated in oral argument, and I think both sides agreed, the reasonable course for a judge in my position would be to construe the Court's earlier order and the subsequently enacted federal legislation to achieve as much harmony as possible and to honor the congressional intent to the extent that the federal legislation trumped my earlier order. But it would also be appropriate in my view to honor the congressional intent only to the extent that the federal legislation trumped my earlier order. Congress did say, of

course, with respect to providing for a defense to enforcement of the wind-down agreements with respect to any areas where the arbitrator ruled in the dealer's favor. And I think that if New GM had failed to honor the arbitrator's award, as I indicated a moment ago, I'd almost certainly enforce it. But that is the way by which we'd maintain harmony between my earlier order and the new Dealer Arbitration Act providing for the rights of dealers to invoke the arbitration mechanism in the fashion for which Congress provided. It doesn't provide for a blank check from me to rewrite the Dealer Arbitration Act.

Nor do I think that Rally can get around what is, in essence, an effort to achieve a quasi-appellate review of the arbitration award by saying that it's asking the California district court to make a federal question type determination under the Dealer Arbitration Act. That might be the case if Congress hadn't established the arbitration mechanism and if it had conferred on the district court's jurisdiction to decide issues as to what is or is not a dealership franchise. But the whole point of the statutory scheme was that New GM and dealers would proceed by arbitration. And while, if New GM had refused to arbitrate in the first place, I think that at least I would have had jurisdiction to order New GM to do so. But now that each of New GM and Rally have engaged in the arbitration process, presumably without any Court forcing either to do so,

we can't make the underlying arbitration award evaporate. We can only consider the circumstances, if any, under which the arbitration award is subject to judicial review. And I've already noted, of course, that the statute doesn't provide for such review.

Now, in that connection, I do not believe that under the allegations we have here, this construction raises constitutional issues. I assume without deciding that procedural due process requires a quasi-judicial determination, like an arbitration, to be conducted by a decider who isn't taking bribes or conspiring with one or another of the parties or, though it's more debatable, who ignored facts or binding authority on point. If there were such a contention, I'd at least have to consider whether I'd address it. And I think it's better to construe the Dealer Arbitration Act in such a fashion as to avoid any constitutional issues that would otherwise be relevant.

But I have no allegations of bribes, conspiracy, fraud or even manifest disregard of existing law in the matter before me. Though, if there were such allegations, I think I'd have to seriously consider whether there might be some implied right to remedy such a wrong or that in exercising my exclusive to jurisdiction to enforce or, impliedly, deny enforcement of the deferred termination agreements, I should take such facts into account. But once more, I emphasize that I have no such

allegations here.

In the absence of issues of that character, I think that Thomas and, particularly, Switchmen, the two decisions by the Supreme Court, apply to establish a rule that where an arbitrator was given the power to resolve controversies under a statute, that is, the Dealer Arbitration Act, where dealers and New GM were given rights under that statute, reviewed by the federal district courts or, of course, bankruptcy courts that are arms of the district court and have the power to issue final orders on core matters, of the arbitrator's determination is not necessary to protect those rights. I think I should restate it because I put too many parentheticals in there. Where dealers and New GM were given rights under the statute reviewed by the federal district courts of the arbitrator's determination is not necessary to protect those rights. And, of course, that's a paraphrase of Thomas, 473 U.S. at 588 quoting Switchmen where I'm analytically substituting the Dealer Arbitration Act for the Railroad Labor Act and where I'm substituting arbitrator's determination for board's determination.

So I don't believe that judicial review is necessary except in those cases not presented here, and here only arguably, where there are allegations of fraud, corruption or manifest disregard of an existing decision. And for reasons I described above, I think the exclusive jurisdiction provisions

of the sale order must stick.

First, of course, they're res judicata so they remain binding in the absence of an appellate ruling changing them for a legislative pronouncement that does so. Second, I assume without deciding that Congress could, if it wished, to have taken my exclusive jurisdiction away just as Congress can take away jurisdiction from the lower federal courts on other matters. But Congress didn't do that. If we temporarily put aside issues as to the right to judicial review and decisions as to the merits, I assume, without deciding, that a California district court could under its diversity jurisdiction have subject matter jurisdiction over a controversy like this one. But if it did, it would be foreclosed from exercising its subject matter jurisdiction by reason of the final exclusive jurisdiction order that I entered back in July of 2009. This is no different analytically than the effect that an exclusive jurisdiction order would have over a state court proceeding. Most state courts don't need an expressed grant of subject matter jurisdiction to hear controversies before them. They normally have subject matter jurisdiction over whatever comes through their doors. But that doesn't mean that they can hear controversies when a court order or other federal law, like some federal antitrust laws or securities laws, give a federal court exclusive jurisdiction. Some federal statutes and the order that I entered into are limits on jurisdiction that might

otherwise exist.

Then Rally makes a judicial estoppel argument noting that in a proceeding against another dealer, New GM brought an action in federal court in California invoking diversity and federal question jurisdiction, the latter under the Dealer Arbitration Act, seeking to require that dealer to comply with a settlement agreement and to drop its efforts to proceed under the Dealer Arbitration Act. Frankly, I'm not impressed with the wisdom of that approach and, for the life of me, can't understand why New GM sought relief that way instead of coming to me. But I don't think its effort in that regard rises to a level of a judicial estoppel.

Rally depends on three statements to establish its claim of judicial estoppel. They are that the district court would have jurisdiction under 28 U.S.C. 1332; that the district court would have federal question jurisdiction under 28 U.S.C. 1331 because the controversy there allegedly arose under the Dealer Arbitration Act; and that arbitrators would only be empowered to decide whether or not the specific dealership should be added back to the GM dealer network and that "all other issues that arise under the Act must be addressed by a Court of competent jurisdiction".

I don't think that any of these are particularly to the point. I've noted before that I assume that diversity jurisdiction provides subject matter jurisdiction to the

California court here. But I've also ruled that that can't trump the bankruptcy court's exclusive jurisdiction provision. And while I disagree that there and here would be federal question jurisdiction under the Dealer Arbitration Act for the particular claim there and here asserted, even if there were such federal question jurisdiction, once more, it wouldn't trump the bankruptcy court's exclusive jurisdiction provision. And I don't think there's anything particularly inconsistent between New GM's third point in that Santa Monica action and the points it's making here given the difference between the facts in each of those cases and the context in which New GM made its observations. There, an attempt to enforce a settlement agreement under which the namees (ph.) agreed to dismiss their arbitration and New GM was saying that arbitration wasn't appropriate at all rather than dealing with the consequences of a completed arbitration in which there was an arbitration award.

But even if there were, I'd see other problems in invoking judicial estoppel as well. As Rally notes, at page 23 in its brief, citing the Second Circuit's decision in Uneeda Doll Company, "judicial estoppel prevents a party from asserting a factual position in one legal proceeding that's contrary to a position that it successfully advanced in another proceeding". Here, aside from the lack of inconsistencies, the positions that have been taken are legal not factual. And

there, New GM didn't ask the Santa Monica Motors court to interpret or enforce the wind-down agreement or, indeed, to interpret or enforce the Dealer Arbitration Act at all. The latter point is why I think that New GM was just wrong when it then tried to invoke the latter as a basis for 1331 jurisdiction. I'm not sure what it was thinking. But under the standards of New Hampshire v. Maine, I find that the positions are not clearly inconsistent and I cannot find any perception that either the first or the second Court was misled or that New GM would derive an unfair advantage here if not estopped.

Finally, I think that even if judicial review were available of the arbitrator's award, I couldn't vacate the arbitrator's award here. First, even if the arbitrator was wrong, I don't see the arbitrator having been so wrong that the error would warrant bucking fundamental principles limiting the scope of review of arbitration awards. There was no case supporting Rally on this issue. Rally is, in substance, asking the Court or the Courts to, in essence, make new law on this point.

And assuming, though for reasons I just noted, I think this assumption is unwarranted, that I could provide ab initio review of the arbitrator's decision, I think the arbitrator got it right at least on the arbitrator's assumption that he could rule one way with respect to the Buick, GMC and

Cadillac franchises and differently with respect to the Chevy franchise. I think the dealer's sales and service agreements have to be read separately. Each stated that it was executed by GM "separately" on behalf of its division identified in the specific addendum. And each dealer agreement provided that the agreement for each line make is independent and separately enforceable by each party and the use of the common form is intended solely to simplify execution of the agreements. So I think that in light of that, Rally had five franchise agreements under which the arbitrator's ruling focusing on each brand separately would be more than merely reasonable. If otherwise warranted by the underlying facts, it would be right.

For the foregoing reasons, New GM is to settle an order in accordance with the foregoing as quickly as reasonably possible, that order to be settled on no less than two business days' notice by hand, fax or e-mail. I assume that New GM will use one of those methods so I don't have to provide for an alternative mechanism if it were to use snail mail. The time to appeal from this determination will run from the time of that order's entry and not from the time of this dictated decision.

All right. Not by way of reargument, are there any matters that I failed to address or any questions?

MR. SNYDER: No, Your Honor.

THE COURT: Hearing none, we're adjourned. Good

evening, folks.

MR. SNYDER: Your Honor, if I may just quickly?

THE COURT: Yes, Mr. Snyder?

MR. SNYDER: Your Honor, under Bankruptcy Rule 8005, to the extent we seek a stay pending appeal and that would be a necessary predicate for an award, for the reasons set forth in our papers and in the oral argument, I request -- am making this oral application for a stay of Your Honor's order pending appeal.

THE COURT: I'll accept the oral application for a stay but we'll do it after a ten minute recess. And each of you can make your points at that point in time.

MR. SNYDER: Thank you, Your Honor.

(Recess from 6:19 p.m. until 6:37 p.m.)

THE COURT: Have seats, please. Okay. Mr. Snyder, your application for a stay.

MR. SNYDER: Thank you, Your Honor. Your Honor, in your decision, I believe the Court stated -- and I apologize if I'm putting words in the Court's mouth -- that areas such as manifest disregard for the law and fraud were not areas that were alleged here. And that might be properly the province if not exclusively the province of the district court in California. And I would ask the Court to turn to, Your Honor, Exhibit I which is Rally's petition to modify. And in Exhibit I, Your Honor, starting on page 10, whether appropriately or

not, Rally uses the Federal Arbitration Act as a guide as to what the district court can look to when determining whether it has jurisdiction. And it starts at the bottom of page 10, and I'm quoting, "that the arbitrator in this matter was guilty of misconduct, misbehavior and exceeded his power, i.e., manifest disregard by ruling on a matter not submitted for determination and, (2)attempting to fashion a remedy not authorized by Section 747 of the Act." And the argument goes on and a little farther down, it addresses corruption, fraud and undue means by GM which, again, although it mirrors a section of the FAA, is also grounds that Rally sought in the California district court in order to vacate and modify the arbitration. So I wanted the record clear that the manifest disregard of the law, fraud and the usual grounds that a party would seek whether under a state statute or the federal arbitration statute to undo the arbitration were pled by Rally in the California action. And so, I believe that those types of matters, and I believe Your Honor pointed this out, matters of manifest disregard, fact and law as well as fraud, corruption, mistake and exceeding powers are matters that the California district court should hear -- can hear, excuse me, and should hear.

Your Honor, has basically said that you have sole and exclusive jurisdiction even though the district court may have jurisdiction over these matters. And as respectfully submitted that the Court may have concurrent jurisdiction but over

matters such as manifest disregard of the law that the federal district court in California also has jurisdiction over this matter. And it's properly before it now.

With respect to the federal question, again, Your Honor seemed to indicate in his decision that the sole and exclusive jurisdiction was given to the bankruptcy court as a result of the wind-down orders. The Court did not address as we go through in detail, starting at page 28 of our objection, the decision of the Supreme Court in Vaden v. Discover Bank. And I alluded to it, Your Honor, in the original argument. But the Supreme Court, overturning, I believe, four circuit courts in Vaden, specifically held that they can look through the petition to look at the parties' underlying substantive controversy. And, Your Honor -- and this is where the Court and Rally might differ. The substantive controversy, the predicate of the petition arises under the Dealer Arbitration Act. It does not arise under the wind-down agreement because it was created not from the wind-down agreement but the Dealer Arbitration Act. So I think there's compelling reasons as a result of the recent Supreme Court case in Vaden to allow the federal district court to hear a federal controversy arising out of a federal statute. And I've been practicing here for a long time, Your Honor. To the extent that it's an issue involving a purchaser wanting to get its -- the value of what it bargained for, we are not saying this Court does not have

jurisdiction. The Court has already held that it has arising-to jurisdiction and it may well have that jurisdiction.

But I think I've pointed to at least two, the federal question issue as well as the due process constitutionality issue as to why the California district court has strong -- strong subject matter -- rights to exercise its subject matter jurisdiction. This is not a cursory -- a statute that only cursorily affects the federal court, but it directly affects the federal court. And I believe, Your Honor, for those reasons, the Court not entertaining or analyzing that and then not seeing that the petition itself does seek -- does allege manifest errors of law as well as fraud and improper powers by the arbitrator that we would be successful on the merits. And we would be able to, Your Honor, obtain a stay of Your Honor's order to the extent it would give us additional time to seek a stay or to seek a determination in either the district court here or in California.

THE COURT: Well, I understand your desire to go to the district court here. I have more trouble trying to go to the district court in California. In fact, that walks, talks and quacks a lot about the actions that Judge Weinfeld found so objectionable in Teachers Insurance v. Butler before the Second Circuit said what it said in Teachers Insurance v. Butler where there was never to collaterally attack his judgment by going to another court. I mean, I don't claim to be infallible, Mr.

Snyder, but it seems to me that if somebody's going to say that I'm wrong, it's got to be either the district court or the Second Circuit.

MR. SNYDER: Your Honor, we were in front of the California district court before GM was here. We can always go back to the filing of the bankruptcy case. But this is clearly different than Teachers. Here, we have already commenced an action in the California district court. We're not forum shopping and running to California because we don't like what the Court is saying. We deferred in this case because they made the motion that we were going to defer to the bankruptcy court before we took any action in California. But we're not looking around for a second bite of the apple. We're already in California. Issues already been joined. They've already answered. So we're at summary judgment stage anyway in California and we have a ticking clock of October 31st. That's very different than going to another Court when you don't like what this Court has to say, Your Honor. I mean, I don't know if we need to address that here. But that's not what we're looking to do. It's for powers other than I to decide whether we seek a stay here or we go back to the Court where there's been a complaint and answer filed and seek a stay there. I'm being straightforward with the Court. It's not our intent and I know the Court might have discomfort with that, but the action was already commenced there. And that's what led to GM

coming here.

THE COURT: Well, forgive me, Mr. Snyder. The reason that you can truthfully say it's discomfort is because I try very hard to consume my anger and to maintain my demeanor. I fully understand the rights of any litigant before me to take me up the street. But going to another Court right after you've litigated before me for the last three hours and I've given you a ruling which may or may not be right but which was after a lot of thought and effort is one that is more than a source of discomfort.

Why don't you continue with the remainder of the three bullets on the applicable case law on an entitlement to a stay and address, if you will, what you're prepared to offer in the way of a bond if I grant a stay?

MR. SNYDER: Your Honor, the argument with respect to the constitutionality -- I had made the argument with respect to whether a federal question exists vis-à-vis the interpretation of the federal statute and going behind the arbitration. I made as well -- I would point out, Your Honor, actually there are four grounds. The third one is diversity. And I think although GM was silent on it, the Court, I believe, in its decision, admitted that diversity exists but, again, stated that the sale order would trump the district court even though diversity might existed there. And the fourth argument, Your Honor, is 48(c) and Your Honor is correct. It does just

refer to judgment. It does not refer to the right to vacate or amend or to modify. It's respectfully submitted, though, Your Honor, that the district court can make that decision as well. Your Honor may be right in all they can do is say thumbs up or thumbs down with respect to a judgment. But at least with respect, I believe, to the fifty state laws, with respect to arbitration and the FAA, it's not so limited, that applicants are usually allowed by statute, certainly under the FAA, to not only seek a judgment but to modify or vacate. But that's something the California district court may hold as well, Your Honor.

And because there are five sep -- four separate grounds, the constitutionality, the federal question, the diversity and Rule 48(c), in Rally's mind, is more than a compelling reason to hold that concurrent jurisdiction exists and not simply exclusive jurisdiction exists. That Your Honor's sale order says what it says but that the Arbitration Act raises issues that need to be addressed. And it's submitted by saying diversity exists but the sale order trumps it, Your Honor, I would suggest that the district court in California does have jurisdiction and does also have the authority to hear these issues. And for those reasons, I think the Court or Rally would be successful in arguing that it would be successful on the merits on those four particular grounds.

I would state also, Your Honor, that the judicial

estoppel argument is just fascinating to me. I -- you asked a question of GM and it was your last question, I believe, which was are you saying you could have gone to New York or California but you decided to go to California. And they said yes. And so, what they're basically saying is we can go to California or New York but you can't. And that argument is, in essence, saying we've waived subject matter jurisdiction by entering into the wind-down agreements. And I don't believe that's correct. And I believe if GM can go into New York and California then Rally can go into New York and California. And to simply say that we're -- our fortunes rise and fall here, well, neither -- GM's fortunes didn't rise and fall here either. They chose not to come here. And so I think we should have that same right.

And for those reasons, Your Honor, we'd like a stay of Your Honor's order until there is an appropriate order of the district court.

THE COURT: All right. Mr. Steinberg?

MR. STEINBERG: Your Honor, in the context of the order that you've indicated that you will enter, a stay pending appeal makes no sense. And the whole oral argument that you heard here before was really a reargument motion and was not a stay pending appeal motion.

Your Honor has indicated that it was inappropriate for them to go to California and to continue to prosecute the

action in California. So if you're going to stay the entry of the order, what does that mean as a practical matter? After having ruled that it was improper to go to California, he now is actually asking you to stay that order so he can go to California? Which is 180 degrees of the relief you just granted? This is not like he has a judgment and he wants to stop us from enforcing the judgment because he wants to take his appellate rights. I'm trying to collect on a monetary judgment. This is started because he shouldn't have gone to California in the first place. He shouldn't have violated the wind-down agreement. He should have done -- he didn't have a judicial right. And now he's asking Your Honor to stay it so he can, in effect, do what he started to do which was the reason why we brought the motion in the first place.

But I think he didn't answer your question what are the four prongs for a stay pending appeal. He did talk about the likelihood of success on the merits. And I don't think he said anything today other than try to reargue what Your Honor had just ruled upon as to the likelihood of success on the merits.

Frankly, the other three grounds all, I think, favor New General Motors. The harm to the appellant -- well, on the surface, one could say he's harmed because the Chevrolet dealership will be terminated on October 31st. The actual harm is that he didn't have a judicial right and you're not

depriving him of a judicial right. Conversely, the harm to others being the appellee, which is New General Motors and the new dealership, are dramatic if Your Honor's order is not enforced. And Your Honor's opinion addressed the public interest element which is the necessity of protecting buyers in a Section 363 order and the Court's exclusive jurisdiction and the public interest that's involved there.

I think the only other thing I would add, and it has nothing to do with the stay pending appeal other than the likelihood of success, I'll just point out that he wants to refer to the complaint that was -- the petition that was filed by Rally in California. On the corruption, fraud and undue means by General Motors, that's just a label that he put on a caption in a petition. He does not allege one thing about fraud corruption in connection with the arbitration process. He's saying that there were public statements made by Fritz Henderson as to, in general, the importance of a dealership network, and he's saying that that was misleading. But it has nothing to do with actually what happened in the arbitration and under the Dealer Arbitration Act. And as far as the misconduct being beyond prec -- established precedent, if you read the paragraph, what he's saying is that the award goes beyond Section 747 because they believe that that statute, which is absolutely silent on the issue, doesn't allow for the assumption of one dealership -- the rejection of one dealership

agreement and the assumption or the reinstatement for the other three. That's the misconduct of going beyond what is established precedent.

Your Honor's decision ruled that if you had to address the merits, even though you weren't, you thought that New GM and the arbitrator was right on that issue. So he can point to a petition, which is based on the Federal Arbitration Act, citing standards but have no application to the facts of this case and then everything else on the standards for a stay pending appeal warrant for the denial of the stay.

And he purposely didn't answer your question as to a bond because, at this point in time, the bond -- we're not looking for a bond. We're looking for the relief that we brought our motion for. And a stay pending appeal is, in effect, a denial of our motion which Your Honor just granted.

(Pause)

THE COURT: Stand by, everybody. Sit in place.

(Pause)

THE COURT: Gentlemen, in this supplemental proceeding, Rally moves by oral motion, with my consent, for a stay pending appeal. And I am granting its motion to the extent of providing for a seven calendar day stay to permit Rally to go to the district court in this district. And the motion is otherwise denied. The following are the bases for my exercise of discretion in this regard.

Though I have no memory of hearing it expressly invoked, a motion of this character is governed by Federal Rule of Bankruptcy Procedure 8005. It provides in relevant part that "A motion for a stay of the judgment order or decree of a bankruptcy judge for relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance...A motion for such relief" granted by -- "or for modification or termination of relief granted by a bankruptcy judge may be made to the district court but the motion shall show why the relief, modification or termination was not obtained from the bankruptcy judge. The district court...may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court."

As the language I just quoted makes clear, the rule is not terribly helpful with respect to the standards for considering a motion of that character. Rather, for that, we look to the case law which, in the bankruptcy appellate arena, takes a considerable amount of guidance from similar issues presented under the FRAP, the Federal Rules of Appellate Procedure.

I exercise my discretion in accordance with my earlier decision, coincidentally in General Motors, at 409 B.R. 24, and the affirmants by Judge Kaplan of the district court in 2009 U.S. District Court Lexis 61279. As I stated in my ruling there, in GM, the decision as to whether or not to grant the

stay of an order pending appeal lies with the sound discretion of the Court. See, for example, In re Overmyer, 53 B.R. at 955. Though the factors that must have to be satisfied have been stated in slightly different ways and sometimes in a different order, it's established that to get a stay pending appeal under Rule 8005, a litigant must demonstrate it would suffer irreparable injury if a stay were denied; there is a substantial possibility, although less than a likelihood of success on the merits of a movant's appeal; other parties would suffer no substantial injury if the stay were granted; and that the public interest favors a stay. See, for example, Hirschfeld v. Board of Elections, 984 F.2d at page 39. It's a decision of the Second Circuit in 1992; In re DJK Residential, 2008 U.S. Dist. LEXIS 19801; and 2008 WL 650389, a decision by Judge Lynch back when he was a district judge; and In re Westpoint Stevens, 2007 U.S. Dist. LEXIS 33725, 2007 WL 1346616, a decision by Judge Swain of the district court.

The burden on the movant is a "heavy one". See, for example, DJK at *2. See also U.S. v. Private Sanitation Industrial Assoc., 44 F.3d 1082 at page 1084, another decision of the Second Circuit. To be successful, the party must "show satisfactory evidence of all four criteria". In re Turner, 207 B.R. at page 375, a decision of the former Second Circuit BAP in 1997. Moreover, if the movant seeks the imposition of a stay without a bond, the applicant has the burden of

demonstrating why the Court should deviate from the ordinary full security requirement. See DJK at *2, Westpoint Stevens at *4.

While, as Judge Lynch noted in DJK, the Second Circuit BAP has held that the failure to satisfy any prong of the four-circuit test "will doom the motion," with Jerry Lynch having cited Turner. The Circuit in more recent cases have engaged in a balancing process with respect to the four factors as opposed to adopting a rigid rule. In my earlier ruling in GM, I assumed without deciding that the balancing approach would be more appropriate. And I'm going to do likewise here. I also note that when Judge Kaplan affirmed me in GM in the decision that I described a few minutes ago, I think he took a similar approach.

Let me start with injury first. Obviously, I take the loss of a franchise seriously. And indeed, early in the decision that I dictated -- I guess it's now an hour or an hour and a half ago -- I did hopefully express my empathy to dealers losing their franchises. However, what caused the lack of the franchise, or the loss of the franchise, is not the ruling that I issued tonight. It was the dealer termination agreement that was entered into over a year ago. What we have here is Congress recognizing the injury to dealers as a consequence of either rejection of dealership agreements, as was the case in Chrysler, or even the soft landing termination agreements that

we had here, provided dealers with an arbitration remedy to, in essence, undo that which otherwise would happen. And Rally took advantage of that and it won in three-quarters -- or four-fifths -- Pontiac, I guess, ultimately not being relevant -- of the matters which it took before the arbitrator. Now, in essence, what it's asking for is to avoid the injury from a year ago and at the same time to avail itself of the benefits of the arbitration to the extent that it won. With it having won with respect to Buick, Cadillac and GMC, I don't think there is irreparable injury to it by reason of its not having shot the moon in its litigation efforts before the arbitrator.

Frankly, folks, I tried very hard to get it right. And we're going to get to a likelihood of success in a minute. But I do not believe that my ruling today causes irreparable injury. And I think really all we're talking about is the results of an arbitration system that was made available for Rally and for which it only succeeded in part.

I will, however, assume that there is a -- at least a peppercorn of irreparable injury. I'm certainly not going to disqualify Rally for not showing more in the way of irreparable injury. And I'm not, as I indicated, going to require it to make a strong showing on all fours. I am going to take a balancing approach so I'm going to turn to that next.

So let's talk then about likelihood of success which is where Rally spent the bulk of its argument. Although we

talk about likelihood of success, that's a shorthand for a more nuanced analysis. The technical standard is there is a substantial possibility although less than a likelihood of success on the merits. Well, let's slice and dice the various aspects of my earlier ruling.

First, the propriety of my conclusion that I do have subject matter jurisdiction and that I have core jurisdiction -- core, of course, not being the subject matter jurisdiction issue but talking about the power of a bankruptcy judge in contrast to a district judge to decide. Those two rulings now seem to be accepted or at least unchallenged. And although there was no express discussion of my decision not to abstain, I didn't hear any argument on that. And, frankly, discretionary abstention is called discretionary for a reason. There would have to be an abusive discretion in my electing not to abstain. And I think that there would not be a material likelihood of success on that and would be far short of a substantial possibility.

On the merits, it's undisputed that we're not talking about the Federal Arbitration Act, that the Dealer Arbitration Act provides no right to appeal. And my ruling did not go so far as to say that under no circumstances under anything that might ever be alleged would I deny the right to appeal. What I have said is that to the extent, if any, to which there would be such a right, a construction to, in essence, save the

constitutionality of the statute if it were otherwise put in question, there would have to be something seriously wrong with the arbitration in the way of fraud, corruption, bribery being a species of corruption, or, and I articulated it differently, disregard of applicable authority. I went on to provide two additional levels -- you can call it dictum; you can call it alternative grounds, whatever, which caused me to believe that it's not likely that there's going to be a reversal.

And as far as whether there's a substantial possibility, on the facts that were put before me, I don't think there's even that. To be sure, words were put before the district judge triggering responses that if this were an action under the Federal Arbitration Act would get a judge's attention. But as the recent decisions by the Supreme Court in Bell Atlantic v. Twombly and, especially, Ashcroft v. Iqbal tell us, just invoking words making conclusory allegations in a pleading isn't enough. You can't talk about corruption without giving the Court some facts as to lead the Court to believe there was corruption. And we're not talking about corruption by GM. We're talking about corruption by the arbitrator. I used the example before of taking bribes. There are no allegations of ex parte communication. There are no allegations of any irregularities in the proceedings before the arbitrator other than the assertion that, as a matter of law, the arbitrator got it wrong. And even then, there's no

allegation that the arbitrator disregarded any particular case that would suggest to the arbitrator that he got it wrong. So while I think there would be a substantial possibility of success on appeal if I were somehow to rule that there is no right to appeal and that I got to close my eyes to irregularities of the type that I just described if they were shown, it doesn't affect the outcome here because I don't have any facts suggesting any of those things. Bottom line, folks, I do not find a substantial possibility.

Third factor. Other parties would suffer no substantial injury if the stay were granted. And here, I think there are potential injuries, at least if we go past October 31st, of one type, for sure, and another which more properly may be regarded as being a public interest concern rather than a private prejudice. For GM's benefit, I'll say that I see no prejudice in staying for five days to allow the district court to second guess me on the stay application. And for that reason, I am going to grant a stay to the extent of five days.

But we have a new dealer who's taking over on the 31st of October. I don't have evidence on it, but I got to assume that the existing franchisee's gain is going to be the new one's loss. They're either going to be competing with each other or that other guy is going to be made to wait if this thing can't proceed past October -- if this somehow proceeds past October 31st. And we have a nationwide program which was

judicially blessed back in July of last year for these dealer unwinds and I think it's prejudicial to New GM to put this system in play to any greater extent than Congress did by its statutory enactment. And Congress didn't say everything you're doing is undone. What it did was say well, we're going to set up this arbitration mechanism. And that's exactly what we got. And it goes without saying that I comply with the congressional but I don't think we should be going beyond what Congress said.

Lastly, the public interest favors a stay. That's the final factor. While I quoted the language before, and I think Rally acknowledged its importance, that we deliver to the purchasers of assets in bankruptcy sales that which we have promised. And if and to the extent that the counterparty to a deal with an estate comes back and says I need you to enforce it so I get the benefit of what I had bargained for, we do that.

I talked back at the time of the original 363 determination and my separate ruling on the stay application that followed my 363 ruling by a couple of days about how important GM's survival is to the public interest and the interest not just of the federal taxpayers but the needs and concerns of the states of Michigan and Ohio and the communities in which GM plants operate. We made decisions then about that which was necessary to give New GM the maximum opportunity to thrive. We made rulings then which are res judicata. I don't

think the public interest is served by interfering with what we then put in place in any way.

Certainly, there is no public interest in allowing this collateral attack. It's a private interest to the extent it's any interest. And when a party that was offered and availed itself the opportunity to arbitrate then wishes to take the portion for which it did not win and put the earlier system in play beyond getting the arbitration opportunity for which Congress provided, that is, at the least, not in the public interest and may fairly be regarded as being contrary to the public interest. At best, looking at it most favorably to Rally, it is a wash because it is private interests that are being sought to be advanced and not public ones.

So, as my discussion indicates, folks, I think we got to go by the book and deal with it as I did in my decision dictated just a moment ago by the four enumerated factors articulated in the case law for the grant of a stay. And it is stayed to permit a second opportunity to go to the district court for those seven calendar days. And so as not to put a gun to the head of the district court having to issue a decision, like Judge Kaplan did where he had to work all night on it, I don't want to do that to the district court again if I can avoid it.

But beyond that, it is denied. Rally is authorized and requested, not ordered, but requested to advise the

district court that an application was made to the bankruptcy court, that the bankruptcy court denied it except to the extent of the five days for the reasons that it dictated into the record and that any further application to the bankruptcy court is dispensed with and waived. From now on, we're in the district court, folks.

Yes, sir?

MR. STEINBERG: Your Honor, I just have some brief moments and I thank you for staying so late for today. In your presentation in connection with the stay pending appeal, you said seven calendar days but I believe you also said at one point in time five days. So --

THE COURT: If I did, it was a reference to five business days. Seven calendar days transposes into five --

MR. STEINBERG: Okay.

THE COURT: -- business days. And ever since we amended the federal rules of many different types last December, we now go on bunches of seven calendar days.

MR. STEINBERG: The second thing, Your Honor, is that while I'm not exactly sure what I would have otherwise done during the seven calendar day period because the wind-down agreement is fairly passive, I do want to make sure that I'm still able to present to Your Honor the order that you had asked for --

THE COURT: Of course you can.

MR. STEINBERG: Okay. And I think that's it. I understand that the only activity that will happen from this point on is in the district court of this district.

THE COURT: Correct. All right. It's been a long day. Good evening, gentlemen. We're adjourned.

(Whereupon these proceedings were concluded at 7:23 p.m.)

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RULINGS

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

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LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

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Date: October 6, 2010